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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Questions Presented

The district court certified these consolidated antitrust actions (one brought by the United States and the other by 19 States and the District of Columbia) for direct appeal to this Court pursuant to the Expediting Act, 15 U.S.C. § 29. That statute, which by its terms applies only to civil antitrust actions "in which the United States is the complainant," provides that upon certification by the district court, this Court shall "either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals." 15 U.S.C. § 29(b). The question presented is:

> Whether this Court should exercise its discretion to decide Microsoft's appeal in the action brought by the United States or deny the direct appeal and remand the case to the United States Court of Appeals for the D.C. Circuit.*

If the Court decides to reach the merits of Microsoft's appeal(s), the questions presented for review will include:

> Whether the district court erred in holding that Microsoft's design of its Windows 95 and Windows 98 operating systems to include Web browsing functionality constituted a tie in violation of Section 1 of the Sherman Act and corresponding state-law provisions.
>
> Whether the district court erred in holding that Microsoft maintained a monopoly in the alleged market for "PC operating systems" in violation of

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* If the Court elects to decide Microsoft's appeal in the action brought by the United States, it will then have to decide whether the Expediting Act confers jurisdiction to hear Microsoft's appeal in the action brought by the States.

Section 2 of the Sherman Act and corresponding state-law provisions.

Whether the district court erred in holding that Microsoft attempted to monopolize the alleged market for "Web browsers" in violation of Section 2 of the Sherman Act and corresponding state-law provisions.

Whether the district court committed additional reversible error in its conduct of these cases by, *inter alia*, (i) denying Microsoft's repeated requests for additional discovery and time to prepare for trial, (ii) commencing trial less than five months after the complaints were filed, (iii) permitting appellees to expand the scope of their cases dramatically notwithstanding the highly expedited schedule, and (iv) admitting into evidence large amounts of inadmissible hearsay in violation of the Federal Rules of Evidence.

Whether the district court erred in entering sweeping permanent injunctive relief based on hearsay declarations without conducting an evidentiary hearing.

Whether the district court erred in entering extreme and punitive relief, including the unprecedented breakup of a unitary operating company, that was unrelated to the antitrust violations found.

Whether the district court erred in dismissing Microsoft's counterclaims against the State attorneys general under 42 U.S.C. § 1983 for seeking, under color of state law, to deprive Microsoft of its rights under federal copyright law by requiring Microsoft to license altered versions of its copyrighted operating systems.

Whether the district court's extrajudicial communications with members of the press require that the judgment be reversed and, if the cases are remanded, that they be assigned to another district judge.

List of Parties and Rule 29.6 Statement

The parties to the consolidated proceedings before the United States District Court for the District of Columbia were appellant Microsoft Corporation and appellees the United States of America, the District of Columbia and the States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, South Carolina, Utah, West Virginia and Wisconsin. South Carolina withdrew from the case during trial.

Microsoft Corporation has no corporate parents, and no publicly held company owns 10% or more of Microsoft Corporation's stock.

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Appellant Microsoft Corporation respectfully requests that this Court deny these direct appeals from the final judgment of the United States District Court for the District of Columbia and remand these cases to the United States Court of Appeals for the D.C. Circuit.

Opinions Below

The district court's findings of fact are reported at 84 F. Supp. 2d 9 and are reprinted in the appendix hereto at pages A46-246. The district court's conclusions of law are reported at 87 F. Supp. 2d 30 and are reprinted at pages A1-43. The district court's final judgment and accompanying memorandum are unreported and are reprinted at pages A247-79.

Jurisdiction

The district court entered final judgment on June 7, 2000. Microsoft filed its notices of appeal on June 13, 2000. On June 20, 2000, the district court certified these cases for direct appeal to this Court pursuant to 15 U.S.C. § 29(b).

Statutory Provisions Involved

These cases involve Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as 42 U.S.C. § 1983, 15 U.S.C. § 29 and the following state-law provisions: CAL. BUS. & PROF. CODE §§ 16720, 16726, 17200; CONN. GEN. STAT. §§ 35-26, 35-27, 35-29; D.C. CODE ANN. §§ 28-4502, 28-4503; FLA. STAT. chs. 501.204(1), 542.18, 542.19; 740 ILL. COMP. STAT. 10/3; IOWA CODE §§ 553.4, 553.5; KAN. STAT. ANN. §§ 50-101 *et seq.*; KY. REV. STAT. ANN. §§ 367.170, 367.175; LA. REV. STAT. ANN. §§ 51:122, 51.123, 51:1405; MD. CODE ANN., COM. LAW § 11-204; MASS. GEN. LAWS ch. 93A, § 2; MICH. COMP. LAWS §§ 445.772, 445.773; MINN. STAT. § 325D.52; N.M. STAT. ANN. §§ 57-1-1, 57-1-2; N.Y. GEN. BUS. LAW § 340; N.C. GEN. STAT. §§ 75-1.1, 75-2.1; OHIO REV. CODE ANN. §§ 1331.01, 1331.02; UTAH CODE ANN. § 76-10-914; W. VA. CODE §§ 47-18-3, 47-18-4; WIS. STAT. § 133.03(1)-(2).

Statement of the Case

These appeals are from a final judgment of the district court holding Microsoft liable under Sections 1 and 2 of the Sherman Act and the corresponding provisions of state law listed above. Judgment was entered following a 78-day trial in two consolidated actions, one brought by the U.S. Department of Justice ("DOJ") and the other by 19 States and the District of Columbia. The judgment embodies one of the most complex and punitive antitrust decrees in history.

Microsoft's appeals raise numerous factual and legal issues as to both liability and relief under federal and state law, and full and fair consideration of those appeals would impose an extraordinary burden on this Court. There are no exigent circumstances that justify the burden of a direct appeal or warrant a deviation from normal appellate procedure.

To the contrary, the administration of justice would be best served by allowing Microsoft's appeals to follow the normal course to the court of appeals. It is impossible in a 30-page jurisdictional statement to address all of the serious factual, procedural and legal issues to be raised on appeal. This statement demonstrates, however, that those issues are numerous and that they are particularly well-suited for review by the court of appeals, which has already taken the unusual step of ordering that the appeals be heard *en banc*. If any issues remain that merit this Court's attention after the court of appeals' decision, this Court can review them on certiorari.

A. Background

The proceedings below went badly awry from the outset. When these actions were filed in May 1998, Assistant Attorney General Joel I. Klein announced that the DOJ was embarking on a "surgical strike," bringing a tightly focused case that centered on Microsoft's design of its Windows operating system to include Web browsing functionality. Over the next two years, however, the district court permitted appellees to transform their cases beyond recognition. In

the course of doing so, the district court, at appellees' urging, committed an array of serious procedural and substantive errors. As a result, what began as a relatively narrow challenge to Microsoft's inclusion of new functionality in Windows ended with the entry of an unprecedented order splitting the company in two.

The complaints in these actions allege two claims under Section 1 of the Sherman Act and its state-law analogues (unlawful tying and exclusive dealing) and two claims under Section 2 and its state-law analogues (maintenance of a monopoly in "PC operating systems" and attempted monopolization of "Web browsers"). Appellees' central allegation was that Microsoft unlawfully foreclosed Netscape from distributing and promoting its Web browsing software, called Navigator, by (i) including Microsoft's own Web browsing software, called Internet Explorer, in its Windows 95 and Windows 98 operating systems, (ii) entering into allegedly exclusive distribution and promotion agreements relating to Internet Explorer, and (iii) not granting computer manufacturers ("OEMs") the right to modify the initial Windows startup sequence and the Windows desktop to hide Internet Explorer from end users.[1]

Appellees contended that Microsoft sought to limit Netscape's distribution of Navigator because it was concerned that Navigator could become a competing "platform" to which application programs would be written, and thus might reduce what appellees viewed as the sole barrier to entry into the operating system business. This purported barrier—referred to as the "applications barrier to entry"—allegedly results from the large number of applications written for Windows relative to other operating systems. In appellees' view, this supposed barrier could be eroded if more applications were written for so-called "middleware"

[1] Microsoft asserted counterclaims under 42 U.S.C. § 1983, alleging that the State attorneys general sought, under color of state law, to deprive Microsoft of its rights under federal copyright law by requiring it to license altered versions of its copyrighted operating systems.

such as Navigator with versions that run on multiple operating systems.

Appellees' complaints sought essentially the same narrow relief, namely, an order enjoining Microsoft from:

> (1) entering into or enforcing certain contractual provisions which allegedly foreclose distribution and/or promotion of competing Internet browsers; (2) distributing a "bundled" version of its operating system and browser unless Microsoft provides a practical way of removing browser functions and provides OEMs that do not wish to license the browser an appropriate deduction from the royalty fee; (3) distributing a "bundled" version of its operating system and browser unless Microsoft treats Netscape Corporation's browser the same as its own with respect to inclusion and removal; and (4) retaliating against any OEM that chooses to remove Microsoft's browser from Windows 98.

United States v. *Microsoft Corp.*, Nos. 98-1232, 1233, 1998 WL 614485, at *1 (D.D.C. Sept. 14, 1998). Together with their complaints, appellees filed preliminary injunction motions seeking basically the same relief.

Following an initial conference, the district court consolidated the two actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. The district court also advanced the trial on the merits and consolidated it with the preliminary injunction hearing pursuant to Rule 65(a)(2). Over Microsoft's objection, the district court scheduled trial to begin less than four months later.

On June 23, 1998, the court of appeals reversed an earlier ruling of the district court in a closely-related action brought by the DOJ against Microsoft under a 1994 consent decree. *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998). On the record before it, the court of appeals held that Windows 95 and Internet Explorer 4.0 constitute an "integrated product" because there are "facially plausible benefits" to the "integrated design" of Windows 95, including its Internet Explorer components, "as compared to an operating system combined with a stand-alone browser such as Netscape's Navigator." *Id.* at 950.

Based largely on the court of appeals' decision, Microsoft moved for summary judgment. In denying that motion, the district court acknowledged that the court of appeals had articulated the controlling legal test for "determining whether an integration amounts to a single product for purposes of evaluating a tying claim." 1998 WL 614485, at *10. The district court denied Microsoft's summary judgment motion, however, because it could not "determine whether Windows and IE are 'separate products' until it becomes clear what are the synergistic benefits that are unique to the Windows/IE combination, *i.e.*, benefits that could not be obtained by combining another browser with Windows." *Id.* at *12.

Although the district court denied Microsoft's summary judgment motion, the court of appeals' decision eviscerated the core of appellees' case, namely, their contention that Microsoft had "tied" Internet Explorer to Windows. Appellees responded to the court of appeals' decision by dramatically expanding the scope of their case, raising new allegations not included in their complaints and seeking to convert a narrow case into an omnibus Section 2 monopoly maintenance action. Over Microsoft's objection, appellees advanced new allegations concerning Microsoft's interactions with Intel, Apple, Sun Microsystems and RealNetworks.

Despite the transformation of the case, the district court pressed ahead with its plan for a compressed and expedited trial. In doing so, the district court assured Microsoft that it "would not be making any findings" and "would not predicate any relief" on matters unrelated to the conduct challenged in the complaints—assurances the district court would later repudiate. On this basis, the district court refused to give Microsoft additional time to conduct discovery and prepare for trial.

Although Microsoft moved for a continuance, trial began on October 19, 1998, just five months after the complaints were filed. The parties concluded their cases-in-chief on February 26, 1999, and presented rebuttal evidence between June 1, 1999 and June 24, 1999. The 78-day trial generated a very large record, consisting of 1,815 pages of written direct testimony, 13,466 pages of trial transcript and 2,695 trial exhibits. Much of the evidence relates to highly technical issues of software design.

At trial, the district court largely suspended application of the Federal Rules of Evidence, admitting numerous newspaper and magazine articles and other rank hearsay. For example, 69 paragraphs of the written direct testimony of James Barksdale, then CEO of Netscape and appellees' first witness, contained inadmissible hearsay, often multiple levels of hearsay. Yet, the district court denied Microsoft's repeated motions *in limine* to exclude such hearsay.

B. The District Court's Rulings

On September 10, 1999, Microsoft and appellees filed their revised proposed findings of fact, which were 679 and 876 pages long, respectively. The district court issued its findings of fact on November 5, 1999. Although 412 paragraphs long, the district court's findings do not contain a single citation to the record, making it impossible to ascertain the basis for many findings and severely complicating review of the district court's determinations. Many of the district court's "findings," moreover, consist of nothing more than sweeping, conclusory assertions. (*E.g.*, Findings ¶¶ 409-12 (A244-46).) The district court also repeatedly ignored uncontradicted evidence submitted by Microsoft on crucial points, such as Paul Maritz's explanation of why Microsoft did not charge separately for Internet Explorer and Jim Allchin's description of the many benefits flowing from the integrated design of Windows that cannot be duplicated by combining an operating system with a stand-alone Web browser like Navigator.

After the district court made its findings of fact, the parties submitted proposed conclusions of law. The district court also invited Professor Lawrence Lessig of Harvard Law School to participate as *amicus curiae*, stating that Lessig would "submit his views exclusively on the issue of technological tying," a subject on which the district court said he was "uniquely qualified to offer advice." In his brief, Lessig stated that "under the Court of Appeals test, Microsoft must prevail."

The district court nevertheless held in its conclusions of law that Microsoft violated Section 1 of the Sherman Act and corresponding state-law provisions by unlawfully tying Internet Explorer to Windows. The district court, however, rejected appellees' exclusive dealing claim under federal and state law, holding that the challenged agreements "did not foreclose enough of the relevant market to constitute a § 1 violation." (A38.) The district court also determined that Microsoft had violated Section 2 and corresponding state-law provisions by maintaining a monopoly in "PC operating systems" and by attempting to monopolize "Web browsers," even though distribution foreclosure is a central premise of both of those violations.

1. Section 1 Tying

Having been told by its "uniquely qualified" *amicus* that Microsoft "must prevail" under the court of appeals' test, the district court refused to apply that test. (A25.) It did so despite its recognition that the court of appeals' June 1998 decision "sought to guide this Court, insofar as practicable, in the further proceedings it fully expected to ensue on the tying issue." (A26.) The district court held that the court of appeals' "undemanding test" was "inconsistent with the pertinent Supreme Court precedents" (A26)—*Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992)—even though the court of appeals had expressly rejected the assertion that the "consumer-demand"

test set out in those decisions applies to claims of "technological tying." 147 F.3d at 946-47. The district court asserted that it was obliged to follow the court of appeals' pronouncements only "until the trail falters." (A26.)

2. Section 1 Exclusive Dealing

The district court dismissed appellees' exclusive dealing claims under Section 1 and analogous state-law provisions because the challenged agreements did not exclude Netscape from the marketplace:

> Microsoft's multiple agreements with distributors did not ultimately deprive Netscape of the ability to *have access to every PC user worldwide* to offer an opportunity to install Navigator. Navigator can be downloaded from the Internet. It is available through myriad retail channels. It can (and has been) mailed directly to an unlimited number of households.

(A37 (emphasis added); *see also* Findings ¶ 357 (A218).) The district court determined that in 1998 alone, "Netscape was able to distribute 160 million copies of Navigator, contributing to an increase in its installed base from 15 million in 1996 to 33 million in December 1998" (A37-38; *see also* Findings ¶ 378 (A228-29)), the very period in which Microsoft had supposedly prevented Netscape from promoting and distributing Navigator. The district court added, however, that "[t]he fact that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute a § 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under § 2." (A38.)

3. Section 2 Monopoly Maintenance

The district court held that Microsoft possesses monopoly power in the purported market for "PC operating systems." (A3-6.) Despite having found that Netscape had access "to every PC user worldwide" (A37), the district court held that

Microsoft unlawfully maintained its putative operating system monopoly by excluding Navigator from two channels of distribution—the OEM channel and the Internet access provider ("IAP") channel. (A9-16.)[2]

The district court concluded that Microsoft's development of new operating systems that included Web browsing functionality and its refusal to permit OEMs to "reconfigure or modify" its copyrighted operating systems to hide access to that functionality reduced the likelihood that OEMs would preinstall Navigator on their new computers. (A10-11.) The district court further found that Microsoft's agreements with Internet service providers and online services "ensure[d] that the IAP channel would generate browser usage share for Internet Explorer rather than Navigator." (A14.)

The district court held that other acts challenged by appellees, while not anticompetitive in and of themselves, "supplemented Microsoft's efforts in the OEM and IAP channels." (A17.) Relying on *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), the district court stated that conduct that was not itself anticompetitive could become unlawful when viewed together with other conduct. (A19-20.) According to the district court, although not all of the challenged acts "independently satisfy the second element of a § 2 monopoly maintenance claim," viewing "Microsoft's conduct as a whole . . . reinforces the conviction that it was predacious." (A20.)

4. Section 2 Attempted Monopolization

The district court also sustained appellees' attempted monopolization claim. Although it acknowledged that

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[2] The district court concluded that Microsoft had maintained an operating system monopoly by supposedly foreclosing Netscape's access to two distribution channels even though (i) the product that was allegedly foreclosed, *i.e.*, Web browsers, constituted, in the district court's view, a separate product market and (ii) only through a long and speculative chain of causation could restricting the distribution of Web browsers have any impact on Microsoft's position in operating systems.

Microsoft's intent was to demonstrate to software developers that Navigator, the leading Web browser at the time, "would never emerge as the standard software employed to browse the Web," the district court concluded that Microsoft possessed the requisite specific intent to monopolize because "there is no evidence that Microsoft tried" to prevent its efforts "from achieving overkill." (A22.) In so ruling, the district court erroneously invoked a *negligence* standard in resolving the issue of *specific intent* necessary for attempted monopolization:

> While Microsoft's top executives never expressly declared acquisition of monopoly power in the browser market to be the objective, they knew, *or should have known*, that the tactics they actually employed were likely to push Internet Explorer's shares to those extreme heights.

(A22 (emphasis added).)

The district court further held that there is a dangerous probability that Microsoft will obtain monopoly power in "Web browsers." (A22-23.) First, the district court concluded that Microsoft's discussions with Netscape in June 1995—before the release of Windows 95 with its built-in Web browsing functionality—created a dangerous probability of monopolization, even though the district court acknowledged that Netscape rejected whatever proposal Microsoft supposedly made at that time. (A23.) Second, the district court noted that Internet Explorer's share of browser usage had subsequently "risen above fifty percent" (A24), although it recognized that over one-third of Internet Explorer's usage share is controlled by AOL, a fierce Microsoft competitor that acquired Netscape during the trial (Findings ¶ 303 (A192)).

C. The Final Judgment

The district court's order accompanying its conclusions of law stated that it would enter relief "following proceedings

to be established by further Order of the Court." (A45.) The district court thereafter held two chambers conferences to discuss procedures to be employed during the remedies phase of trial. At the first conference—held the day after the district court issued its conclusions of law rejecting the court of appeals' "technological tying" test—the district court disclosed its plan to invite the DOJ to bypass the court of appeals by seeking direct review in this Court pursuant to the Expediting Act.

At both conferences, Microsoft stated that it could not take a position on the procedures for the remedies phase of trial until it received appellees' proposal for relief. The district court responded that this position was "fair" and "reasonable." When asked by Microsoft whether it "contemplate[d] further proceedings of some kind or another" on remedies, the district court replied, "I would assume that there would be further proceedings." The district court then stated that it might "replicate the procedure at trial with testimony in written form subject to cross-examination." The district court subsequently issued Scheduling Order No. 8, which required Microsoft to submit only "its summary response to plaintiffs' proposal(s), including its objections to any or all proposed forms of permanent injunction, any counter-proposal(s) to the plaintiffs' submission(s), and its recommendations for future proceedings on the issue of remedy."

On April 28, 2000, appellees filed their proposed decree, together with six supporting declarations. Although such radical relief was not even hinted at in their complaints, appellees (with two States dissenting) requested that Microsoft be split into two companies, one that would receive Microsoft's operating systems and another that would receive Microsoft's other products (including numerous operating system components). While the breakup proposal was the most dramatic aspect of the decree, other proposed provisions were equally extreme, extending far beyond the case that was tried and encompassing products

wholly outside the markets defined by the district court. Appellees requested, *inter alia*, that Microsoft be required to disclose proprietary information concerning its desktop, server and embedded operating systems—including source code—to any firm claiming a desire to make its products "interoperate effectively" with those operating systems, a group that includes all of Microsoft's competitors. Appellees further requested that Microsoft be required to redesign its operating systems to enable OEMs and end users to substitute third-party software for components of the operating system, thus forcing Microsoft to offer operating system features on an *à la carte* basis and severely hindering Microsoft's ability to improve its products.

On May 10, 2000, Microsoft submitted the materials required by Scheduling Order No. 8, expressly requesting discovery and an evidentiary hearing on the issue of relief. Microsoft also filed a motion for summary rejection of appellees' breakup proposal, arguing that dismemberment of Microsoft is unwarranted as a matter of law.

The district court heard argument on May 24, 2000. Despite the prior discussions in chambers and the terms of Scheduling Order No. 8, the district court announced, "I intend to proceed to the merits of the remedy." At the conclusion of the argument, Microsoft asked what further proceedings there would be on relief, to which the district court responded, "I'm not contemplating any further process."

On June 7, 2000, the district court signed appellees' proposed final judgment as ultimately proffered without a single substantive change. It thus entered radical and unwarranted permanent injunctive relief, including the breakup of Microsoft, without conducting an evidentiary hearing or making any findings on the issue of relief. In an accompanying memorandum, bereft of a single citation to case law or evidence, the district court stated that "a structural remedy has become imperative" because "Microsoft does not yet concede that any of its business practices violated the Sherman Act." (A249.) The district court criticized

Microsoft for being "unwilling to accept the notion that it broke the law" (A249), even though Microsoft's exercise of its appellate rights provides no conceivable basis for imposing punitive sanctions. Far from finding that the relief entered would increase competition, the district court remarked that even "purportedly knowledgeable people" do not know what "may or may not ensue." (A250.) The district court also rejected the notion of having an evidentiary hearing to explore that question because "testimonial predictions of future events" are "less reliable even than testimony as to historical fact." (A250.) In a candid abdication of its Article III responsibilities, the district court offered the following rationale for its entry of the final judgment presented by appellees:

> Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants. These officials are by reason of office obliged and expected to consider—and to act in—the public interest; Microsoft is not.

(A250-51 (footnote omitted).)

Microsoft filed its notices of appeal on June 13, 2000. Less than one hour later, the court of appeals *sua sponte* issued orders providing that "all motions and petitions filed in these cases shall be heard by the court sitting *en banc*." (A311-12.) Later that evening, appellees presented a joint motion to the district court for certification of direct appeal to this Court pursuant to 15 U.S.C. § 29(b). On June 20, 2000, the district court granted appellees' motion with no explanation except to repeat the language of the Expediting Act. The district court also stayed the judgment in its entirety until Microsoft's appeals are decided.

D. The District Court's Press Interviews

Beginning the day after judgment was entered, numerous news organizations, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Washington Post*, *Newsweek*, *USA Today*, Marketplace Radio and National Public Radio, published stories based on interviews with the district court. It was reported that the district court, without notice to Microsoft, had been granting extrajudicial interviews to members of the press for nine months, *i.e.*, since before entering its findings of fact.[3] The district court's blunt comments to the press raise serious questions about its impartiality and betray a misguided belief that appellees were entitled to the remedy of their choice, no matter how extreme, simply because they had prevailed on liability.

For instance, the *Wall Street Journal* quoted the district court as giving the following explanation for its refusal to provide Microsoft with a hearing before entering relief: "[I]t's procedurally unusual to do what Microsoft is proposing—are you aware of very many cases in which the defendant can argue with the jury about what an appropriate sanction should be? Were the Japanese allowed to propose the terms of their surrender? The government won the case." John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue*, WALL ST. J., June 8, 2000, at A8.

The *New York Times* reported that "Judge Jackson agreed to be interviewed several times after testimony in the trial had ended, with the understanding that his comments could not be published until the case had left his courtroom. The discussions, beginning last September, were friendly, informal and unstructured." Joel Brinkley & Steve Lohr, *Retracing the Missteps in the Microsoft Defense*, N.Y.

[3] Canon 3A(6) of the Code of Conduct for United States Judges provides: "A judge should avoid public comment on the merits of a pending or impending action . . . ." 175 F.R.D. 364, 367 (1998). The official commentary to this canon states: "The admonishment against public comment about the merits of a pending or impending action continues until completion of the appellate process." *Id.* at 370.

TIMES, June 9, 2000, at C8. When asked by the *New York Times* about the possibility of a breakup of Microsoft during a February 2000 interview—described as "a rare audience with a sitting judge during the course of a trial"—the district court is quoted as saying, "I am not sure I am competent to do that." *Id.* at A1. When asked in a later interview why it had simply rubberstamped appellees' proposed relief, including a breakup of Microsoft, the district court apparently stated, "I am not in a position to duplicate that and reengineer their work. There's no way I can equip myself to do a better job than they have done." *Id.* at C9. Lastly, in a repudiation of a fundamental tenet of American jurisprudence, the district court is quoted as offering the following rationale for denying Microsoft an evidentiary hearing on relief, "I am not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." *Id.* at C8.

Reasons for Denying Direct Appeal

The Expediting Act gives this Court unqualified discretion to deny direct appeal and remand these cases to the court of appeals. 15 U.S.C. § 29(b). In certifying these cases, the district court made no determination that Microsoft's appeals were suitable for immediate consideration by this Court. In fact, appellees advised the district court that suitability for direct review was "not properly a part of [the district court's] certification decision" because the "Expediting Act affords the Supreme Court broad discretion to remand an appeal to the court of appeals if it considers the case inappropriate for its plenary review."

In exercising "its discretion" whether to hear these appeals, 15 U.S.C. § 29(b), this Court owes no deference to the district court's decision to certify the appeals under the Expediting Act. *Cf. Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 883 n.9 (1994) (court of appeals has broad discretion to decline appeal certified under 28 U.S.C. § 1292(b)); 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929, at 378 (1996) ("The

discretion of the court of appeals [to decline an appeal under Section 1292(b)] is so broad that it is difficult to imagine any controlling limit . . . ."). Rather, Congress amended the Expediting Act to give this Court unfettered discretion to consider the nature and number of issues raised by an appeal and to determine whether the judicial process would be better served by initial review in the court of appeals.

This is not a case in which the Court should exercise its discretion to hear a direct appeal, thereby undertaking the onerous task of sifting through a large and complex record and forgoing the many benefits of intermediate appellate review. As two leading commentators observed, without the assistance of the court of appeals,

> the Supreme Court is often forced to ferret out the issues and the pertinent facts from the raw district court records. All issues, whether important or not, must sometimes be resolved by the Court where no other appellate review is possible. That burden can be particularly heavy when a complex civil antitrust case brought by the Government is appealed directly from a district court . . . .

Bennett Boskey & Eugene Gressman, *Recent Reforms in the Federal Judicial Structure*, 67 F.R.D. 135, 145 (1976). There is no need for this Court to assume such a burden here. Indeed, the number and nature of the errors below militate strongly in favor of review by the court of appeals.

I. The Appeals Raise Many Difficult Factual Issues.

Microsoft's appeals raise numerous complicated factual issues. Resolution of these issues will require the reviewing court to sift through an extensive record. That task will be even more demanding because of the complexity of the technologies at issue and the district court's failure to provide *any* citations to the record to support its findings. Unlike the courts of appeals, which are charged with combing through voluminous trial records to resolve factual

challenges, this Court is a court of law, not "a court for correction of errors in fact finding." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

In fact, Congress amended the Expediting Act in 1974 to relieve this Court of mandatory direct review of civil antitrust actions brought by the United States precisely because of the Court's repeatedly expressed conviction that such factual review should be performed by the court of appeals:

> Many civil antitrust cases require the Supreme Court to read thousands of pages of transcript from the district court. A question arises as to the adequacy of the review the Supreme Court can give to those cases in which there are voluminous trial records. Almost all the present Justices have, both in and out of Court, asked that these cases go first to the courts of appeals.

S. REP. NO. 93-298, at 8 (1973). The 1974 amendments to the Expediting Act thus "narrowed, almost to the point of extinction, the right to appeal directly to the Supreme Court" from judgments entered in civil antitrust cases brought by the United States. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 2.7, at 50 (7th ed. 1993).

Prior to the 1974 amendments to the Expediting Act, this Court had stated that "[d]irect appeals not only place a great burden on the Court but also deprive [it] of the valuable assistance of the Court of Appeals." *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963) (1,723-page record). Justice Harlan observed that "there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 364 (1962) (Harlan, J., dissenting in part and concurring in part). Chief Justice Burger referred to "the unsoundness of the direct appeal permitted in cases of this kind under 15 U.S.C. § 29," stating that in a "factually complicated case," this Court is "immeasurably aided by the screening process

provided by a Court of Appeals review." *Ford Motor Co.* v. *United States*, 405 U.S. 562, 595 n.5 (1972) (Burger, C.J., concurring in part and dissenting in part). And Justice Marshall likewise noted that direct appeal "unjustifiably burdens this Court with inadequately sifted records and with cases that could be disposed of by review in the court of appeals." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 170 (1972).

Many of the district court's findings of fact are clearly erroneous, particularly those regarding (i) Microsoft's supposed foreclosure of Netscape from specific channels of distribution, and (ii) Microsoft's design of Windows 95 and Windows 98. For instance, the district court found, apparently based on testimony of Netscape CEO Barksdale, that "Microsoft has largely succeeded in exiling Navigator from the crucial OEM distribution channel." (Findings ¶ 239 (A159).) According to the district court, "[b]y the beginning of January 1999, Navigator was present on the desktop of only a tiny percentage of the PCs that OEMs were shipping." (*Id.* (A160).) In fact, documents reporting the results of AOL's due diligence investigation prior to its acquisition of Netscape—elsewhere relied on by the district court—state that as of 1998 Navigator was distributed on "22% of OEM shipments." When confronted with these documents at trial, appellees' economist, Frank Fisher, acknowledged that Barksdale's testimony was an "exaggeration." No probative evidence thus supports the district court's finding of foreclosure in the OEM channel.

The district court also found that Microsoft "bound" Internet Explorer to Windows 98 "by placing code specific to Web browsing in the same files as code that provided operating system functions." (*Id.* ¶ 161 (A122).) Once again, no probative evidence supports that finding. At trial, appellees called three technical experts, two of whom, Glenn Weadock and David Farber, admitted that they had *never seen* the source code for Windows 98. Appellees' third technical expert, Edward Felten, acknowledged that he did no

"study of what code might be removable or not removable" from Windows 98 because it was "specific to Web browsing." In contrast, Jim Allchin, the senior vice president responsible for the development of Windows 98, testified without contradiction that there is no code specific to Web browsing that is mixed with code specific to operating system functions, but rather that the *very same code* provides both functions:

> The very same software code in Windows 98 that provides Web browsing functionality *also* provides (i) platform support to developers, (ii) user interface software (for Windows itself and other software products) and (iii) access to information stored in locations other than the Internet. That software code is called Internet Explorer, and it is so central to the operation of Windows 98 that the operating system would fail to function if it were removed.

The task of reviewing these and other factual determinations will be complicated by the district court's admission of large amounts of hearsay and by its failure to include any citations to the record in its findings of fact. Moreover, to the extent appellees argue that the district court's evidentiary and other errors were harmless, the reviewing court will have to comb through the *entire* record to make that determination. 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2883, at 448-49 (1995) ("The entire record must be considered and the probable effect of the error determined in light of all of the evidence.").

II. The Appeals Raise Numerous Legal Issues.

These appeals are not confined to one or two legal issues of the sort this Court normally considers on certiorari. They instead involve a wide range of procedural and substantive issues more appropriately resolved by the court of appeals.

Many of the issues raised are important only to resolution of these particular cases, presenting mixed questions of fact

and law. For example, the district court adopted a market definition that is so narrow that it excludes *both* Apple's Mac OS operating system (Findings ¶¶ 20-21 (A52-53)) *and* the competing platform technologies—Navigator and Java—that the district court determined posed the greatest competitive threat to Microsoft's putative operating system monopoly (*id.* ¶¶ 68-77 (A78-82)). The district court also erroneously held that Microsoft's position in operating systems is protected by the so-called "applications barrier to entry." (*Id.* ¶¶ 36-52 (A61-70).) In finding that the burden of convincing software developers to write applications for platform software is an entry barrier, the district court confused a fundamental element of competition in the platform business with a barrier to entry. As the district court found, Microsoft itself invests hundreds of millions of dollars "each year inducing [software developers] to write applications for Windows." (*Id.* ¶ 43 (A65).)

Other issues raised involve the misapplication of settled law. For example, the district court erroneously branded as anticompetitive Microsoft's efforts "to maximize Internet Explorer's share of browser usage at Navigator's expense" at a time when Navigator enjoyed a substantial majority of usage. (A10.) Indeed, the notion that Microsoft's desire to increase Internet Explorer's usage share somehow rendered its conduct anticompetitive was a recurring theme of the district court's ruling. By condemning vigorous competition by a new entrant into a purported market, the district court evinced a profound misunderstanding of the antitrust laws.[4]

Still other issues involve irreconcilable conflicts between the district court's own findings of fact and its conclusions of

[4] *See Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

law. For instance, the district court found that Microsoft's intent was to demonstrate to software developers that "Navigator would not become the standard" Web browsing software (Findings ¶ 133 (A108)) at a time when "Navigator seemed well on its way to becoming the standard" (*id.* ¶ 377 (A228)). Yet, in its conclusions of law, the district court determined that Microsoft's efforts to *prevent* Netscape from monopolizing Web browsing software established that Microsoft itself had the requisite specific intent to monopolize "Web browsers."

Although the following list of errors, set out in roughly chronological order, is not exhaustive, it reflects the principal legal issues Microsoft intends to raise on appeal:

- whether the district court erred in starting trial five months after the complaints were filed despite allowing appellees to broaden their case dramatically;
- whether the district court erred in admitting large amounts of inadmissible hearsay over Microsoft's objection;
- whether the district court erred in holding that the relevant product market is limited to "PC operating systems," thereby excluding the principal competitive threats to Windows;
- whether the district court erred in holding that the need to persuade software developers to write applications for a platform constitutes a barrier to entry into the relevant product market;
- whether the district court erred in holding that Microsoft possesses monopoly power in a relevant product market;
- whether the district court erred in holding that Microsoft maintained a monopoly through anticompetitive conduct by seeking to maximize Internet Explorer's usage share at Navigator's expense;
- whether the district court erred in holding that appellees need not establish a causal connection between the

alleged anticompetitive conduct and Microsoft's supposed maintenance of a monopoly;

- whether the district court erred in holding that acts that are not themselves anticompetitive under controlling legal principles can become anticompetitive when viewed in combination with other acts;
- whether the district court erred in holding that Microsoft's development of new operating systems that include Web browsing functionality constituted an unlawful tie;
- whether the district court erred in holding that Internet Explorer is unlawfully tied to Windows when Navigator runs perfectly well on that operating system and tens of millions of people use Navigator with Windows;
- whether the district court erred in holding that agreements that did not violate Section 1 of the Sherman Act because they did not foreclose Netscape's access to consumers nevertheless violated Section 2;
- whether the district court erred in holding that provisions in Microsoft's license agreements with OEMs that, consistent with Microsoft's rights under federal copyright law, do not permit OEMs to modify Microsoft's copyrighted operating systems without Microsoft's permission violate Section 2 of the Sherman Act;
- whether the district court erred in holding that Microsoft possessed a specific intent to monopolize the alleged market for "Web browsers" when the district court found that Microsoft's intent was to prevent Netscape from achieving such a monopoly;
- whether the district court erred in holding that there is a dangerous probability that Microsoft will achieve monopoly power in the alleged market for "Web browsers" when the district court found that over one-third of Internet Explorer's usage share is controlled by AOL, which now owns Navigator;
- whether the district court erred in holding that Microsoft's June 1995 discussions with Netscape created

a dangerous probability of monopolization of the alleged market for "Web browsers" when it is undisputed that Netscape rejected whatever proposal Microsoft supposedly made;

- whether the district court erred in dismissing Microsoft's counterclaims against the State attorneys general for seeking, under color of state law, to deprive Microsoft of its rights under federal copyright law;
- whether the district court erred in entering a sweeping permanent injunction without an evidentiary hearing on relief;
- whether the district court erred in imposing extreme and punitive relief unrelated to the antitrust violations found; and
- whether the district court's extrajudicial communications with the press concerning the merits of these cases in violation of Canon 3A(6) of the Code of Conduct for United States Judges require that the judgment below be reversed and, if the cases are remanded, that they be assigned to another district judge.

The sheer number of issues raised by Microsoft's appeals makes these cases unsuitable for direct appeal. To the extent that some of the legal issues may ultimately be dispositive and involve "an important question of federal law that has not been, but should be, settled by this Court," S. CT. R. 10(c), this Court's review would be aided immensely by having the court of appeals clear out the procedural and factual underbrush first.

III. The District Court Should Not Be Permitted To Use the Expediting Act To Evade the Authority of the Court of Appeals.

On the most important issue in these cases—technological tying—the district court expressly rejected binding circuit precedent, holding that the court of appeals' test is inconsistent with two decisions of this Court. The court of appeals, however, expressly considered both of those decisions in

fashioning its test. The district court refused to apply circuit precedent despite acknowledging that the court of appeals had "anticipated the instant case" and "sought to guide this Court, insofar as practicable, in the further proceedings it fully expected to ensue on the tying issue." (A26.)

The day after rejecting the court of appeals' test, the district court disclosed its intention to invite the DOJ to seek direct review in this Court: "I would be remiss if I didn't tell you that I will be inviting from the government a motion under 15 U.S.C. § 29(b), the Expediting Act, to provide for direct review in the Supreme Court."

Congress did not intend the Expediting Act to render district courts "circuitless" in antitrust actions brought by the United States. Our federal court system is hierarchical. *See Agostini* v. *Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Hutto* v. *Davis*, 454 U.S. 370, 374-75 (1982). If a decision of the court of appeals applies, the district court is required to follow it, leaving to the court of appeals or this Court the prerogative of rejecting that decision. *United States* v. *Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either we, sitting *en banc*, or the Supreme Court overrule it.").

The Expediting Act is not a vehicle for annulling the authority of the court of appeals. This Court should not countenance the district court's attempt, abetted by appellees, to circumvent appellate review by the court of appeals, "the regular court for reviewing orders of the District Court here concerned." *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958).

IV. Immediate Consideration of Microsoft's Appeals by This Court Is Not of General Public Importance in the Administration of Justice.

"Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903," that rationale no longer applies.

Singer Mfg. Co., 374 U.S. at 175 n.1. In 1903, the Sherman Act was only 13 years old, and the courts of appeals had been in existence only 12 years. Because the courts of appeals were relatively new, they were not thought capable of handling appeals in civil antitrust actions brought by the United States, which at the time raised novel and important issues concerning governmental regulation of private enterprise. *See* Robert C. Bonges, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 MICH. L. REV. 1240, 1241-42 (1965); *see also Tidewater Oil Co.*, 409 U.S. at 156. As Justice Harlan noted almost 40 years ago, however, "[t]he legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law." *Brown Shoe*, 370 U.S. at 364 (Harlan, J., dissenting in part and concurring in part). In fact, the courts of appeals have played a vital role in the development of our antitrust jurisprudence. *See, e.g., Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *MCI* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Since the Expediting Act was amended in 1974, this Court has entertained a direct appeal in an antitrust case only twice, both times involving AT&T's agreed divestiture of its local telephone companies. *California* v. *United States*, 464 U.S. 1013 (1983); *Maryland* v. *United States*, 460 U.S. 1001 (1983). The *AT&T* appeals illustrate the very limited circumstances in which direct appeal to this Court is appropriate.

After approving the divestiture plan, the district court in the *AT&T* case permitted numerous objecting parties to intervene for purposes of appeal. Several intervenors as well as the DOJ moved the district court to certify the case for direct appeal to this Court, and AT&T and nearly all of the remaining intervenors supported certification. In certifying the case, the district court stated that immediate consideration by this

Court was necessary because the decree (which was not stayed pending appeal) required AT&T to divest its local telephone companies in 15 months and extensive preparations were already under way. *United States* v. *Western Elec. Co.*, No. 82-0192, 1982 WL 1931, at *1-2 (D.D.C. Nov. 10, 1982). The district court also stressed that the appeals raised "a relatively narrow range of questions," *id.* at *2 n.7a, and that those questions were "of significant importance to the administration of justice" because they called into question the powers of district courts under the Tunney Act, 15 U.S.C. § 16(b)-(h). *Id.* at *2. Lastly, the district court noted that representatives of various States and local utility commissions had stated that they intended to seek injunctive relief in their local federal courts, interfering with the settlement and potentially creating conflicts among federal courts that only immediate review by this Court could prevent. *Id.* In *Maryland*, this Court summarily affirmed the district court's judgment without opinion over three dissents; in *California*, it again summarily affirmed the district court's approval of the divestiture plan without opinion.

The *AT&T* appeals are readily distinguishable from the instant appeals in three important respects. First, because *AT&T* involved a negotiated consent decree, there were no findings of fact or trial record to be reviewed. *Maryland*, 460 U.S. at 1002 (Rehnquist, J., dissenting). Second, the *AT&T* appeals raised narrow legal questions of significant importance to the administration of justice that this Court could—and did—resolve summarily. Third, both the DOJ and AT&T supported immediate consideration of the appeals by this Court. These appeals, in contrast, are a morass of procedural and substantive issues that can be resolved only through a painstaking review of a lengthy and technologically complex trial record.

The many issues raised by these appeals are likely to necessitate oversized briefs and appendices and extended oral argument. Indeed, were this Court to hear argument this winter, it might well not render a decision until October

Term 2001. Prior to 1974, when this Court's jurisdiction under the Expediting Act was mandatory, appeals in civil antitrust cases brought by the United States that were not disposed of summarily were routinely carried over to the following term.[5] As Justice Clark observed in *Brown Shoe*, where more than two years passed before this Court's decision, direct appeals pursuant to the Expediting Act "seldom result[] in much expedition." 370 U.S. at 355 (Clark, J., concurring); *see also id.* at 364 ("And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Expediting Act.") (Harlan, J., dissenting in part and concurring in part).

Microsoft's appeal in the States' separately-filed action is an added complicating factor and further reason to remand the appeal in the DOJ's action. By its terms, the Expediting Act confers jurisdiction on this Court to hear direct appeals only in civil antitrust actions "in which the United States is the complainant." 15 U.S.C. § 29(a). The United States is not *the* complainant—indeed, not even *a* complainant—in the States' action. Consolidation "does not merge the suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933); *see also* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2382, at 430 (1995). Each consolidated case "must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Butler* v. *Dexter*, 425 U.S. 262, 267 n.12 (1976). As a result, accepting direct appeal of the DOJ's action would mean that, contrary to the goals of the Expediting Act,

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[5] *See, e.g., United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947).

Microsoft's two appeals would proceed in separate courts, thus delaying ultimate resolution of the two cases.[6]

Arrayed against these compelling considerations favoring remand, neither the district court nor appellees have advanced any special circumstance that requires these appeals to be heard first by this Court. These two actions have already been pending for over two years, and the district court identified no specific harm that will result from the lack of immediate consideration by this Court. In fact, over appellees' objection, the district court itself stayed all relief pending appellate review.

V. The Administration of Justice Would Be Best Served by Allowing These Appeals To Proceed Along the Normal Route to the Court of Appeals.

The severity of the remedy imposed and the significance of these cases to the Nation's economy make it more important—not less—that these appeals proceed through intermediate appellate review in the normal course. As this Court has recognized, district court decisions in antitrust actions require particularly close appellate scrutiny. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961); *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959). "[I]n suits under the Sherman Act, it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge," without careful and deliberate appellate review. *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571

[6] The States have announced that they intend to file a petition for writ of certiorari before judgment pursuant to 28 U.S.C. §§ 1254(1) and 2101(e), but they have not yet done so. Rule 11 provides that such a petition "will be granted only upon a showing that the case is of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." This Court has granted certiorari before judgment only "in cases of great constitutional significance and of extraordinary national importance for other reasons." ROBERT L. STERN, ET AL., *supra* § 4.20, at 199. Microsoft's appeal in the States' case does not satisfy that demanding standard.

(1945). Here, there is no reason to skip what this Court has recognized as a crucial step in the appellate process. *See Ford Motor Co.*, 405 U.S. at 595 n.5 (Burger, C.J., concurring in part and dissenting in part).

In fact, many of the issues presented by these appeals are particularly well-suited for review by the court of appeals. Review of procedural, evidentiary and factual issues is the normal province of the court of appeals. This Court generally does not address issues that are intensely fact-bound and that do not raise general and recurring questions of federal law on which authoritative pronouncements are required. In addition, the court of appeals has already spoken on a central issue in these cases—the standard applicable to claims of technological tying—and should be given the first opportunity to review the district court's decision on that issue.

The court of appeals also should be given an opportunity to address the propriety of the district court's extrajudicial discussions with the press about the merits of these cases. *United States* v. *Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (district judge disqualified because of comments made during appearance on television program "Nightline"). The court of appeals has already admonished the district court once for airing its views on a pending case outside of a judicial forum. *See In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); *see also id.* at 917 (Edwards, J., dissenting) ("[T]he Canon is clear in indicating that a judge *never may discuss the merits of a pending case in a non-judicial forum, especially when he has reason to know that the parties to the litigation may appear before him again for further judgment in the case.*") (emphasis in original). This Court has also recognized that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-60 (1957).

If these appeals can be decided by the court of appeals on narrow, case-specific grounds, this Court may never need to review these cases. But even if important issues of law

remain after the court of appeals' decision, this Court would still benefit from the court of appeals' analysis of them. The court of appeals' orders providing that these appeals will be heard *en banc* have eliminated one step in the process—a petition for rehearing *en banc*. The prompt manner in which the court of appeals entered those orders makes plain that it appreciates the importance of these cases and will act as expeditiously as is consistent with appropriate deliberation.

Whatever time, if any, might be saved by immediate review here is outweighed by the benefits to this Court, the parties and the administration of justice of ensuring comprehensive and careful review of the decision below. As Justice Frankfurter once observed, "Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). The importance of these cases will not lie in how quickly they are resolved, but in their long-term effects on consumers and this Nation's economy. Allowing these appeals to proceed along the normal route to the court of appeals will best serve those interests.

Conclusion

This Court should deny these direct appeals and remand the cases to the court of appeals.

Respectfully submitted,

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